IN THE

Supreme Court of the United States

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October Term, 1971

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

EDITH KRIVDA and ROGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

RESPONSE NOT PRINTED

EVELLE J. YOUNGER,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

RONALD M. GEORGE,
Deputy Attorney General of the State of California,

500 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
(213) 620-2093,

JOSEPH P. BUSCH,
District Attorney of Los Angeles County,

HARRY WOOD,
Head, Appellate Division,

HARRY B. SONDHEIM,
DANIEL L. LIEBERMAN,
Deputy District Attorneys,

Attorneys for Petitioner.

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IN THE

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No. .....

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH KRIVDA and ROGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

Petitioner State of California respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in this proceeding on July 12, 1971, affirming a judgment of dismissal prior to trial, whereby the petitioner must forego prosecution of the respondents for the charged offense of possession of marijuana.

Opinions Below

The opinion of the California Supreme Court, a copy of which is set forth as Appendix A to this Petition, is reported as *People v. Krivda*, 5 Cal. 3d 357 [96 Cal. Rptr. 62, 486 P.2d 1262] (1971). A copy of the order of the California Supreme Court, denying petitioner's petition for rehearing, is set forth

as Appendix B. The prior opinion of the California Court of Appeal, Second Appellate District, Division One, a copy of which is set forth as Appendix C, is reported as *People v. Krivda*, 91 Cal. Rptr. 219 (1970).

Jurisdiction

The judgment of the California Supreme Court which is sought to be reviewed was entered on July 12, 1971, that court entering a further order on August 16, 1971, denying petitioner's petition for rehearing and application for stay of the remittitur. The present Petition for Writ of Certiorari is being filed within ninety days of the aforementioned order.

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

Questions Presented

1. Whether a person who deposits contraband in a trash receptacle which he places on public property adjacent to a street, for the purpose of pickup by municipal trash collectors, exhibits a reasonable expectation of privacy that such contraband will not be viewed inside the bin of a garbage truck at some distance from the place of pickup and prior to conglomeration of the contraband with other trash.

2. Whether in any event application of the exclusionary rule is constitutionally compelled under the circumstances of the present case.

Constitutional Provisions Involved

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particulary describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

A. History of the Case

In an information filed by the District Attorney of Los Angeles County, respondents were charged with possession of marijuana in violation of section 11530 of the California Health and Safety Code. [Cl. Tr.[1] p. 90.] Respondents' motion in the Los Angeles Superior Court to set aside the information pursuant to California Penal Code section 995 was denied. [Cl. Tr. p. 92.] Respondents thereafter entered pleas of not guilty. [Cl. Tr. p. 93.]

Respondents' motion to suppress evidence pursuant to California Penal Code section 1538.5 was submitted on the transcript of the preliminary hearing [Cl. T. pp. 1-89] and on further testimony had at a hearing on that motion. [Rep. Tr.[2] pp. 1-37.] The motion was denied on October 24, 1969. [Cl. Tr. pp. 101, 103.] With the same judge presiding, the court on December 12, 1969, reopened the motion and on the same evidence and argument reversed its ruling and granted the motion to suppress evidence. On petitioner's representation that no other or additional evidence existed, and on motion of the court, the proceedings against respondents were dismissed. [Cl. Tr. p. 106.]

Petitioner appealed to the California Court of Appeal, Second Appellate District, from the judgment of dismissal and order suppressing the evidence. On November 16, 1970, Division One of that court reversed

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[1]Reference is to the Clerk's Transcript, a certified copy of which has been filed with this Court.

[2]Reference is to the Reporter's Transcript of the hearing on the motion, a certified copy of the transcript having been filed with this Court.

the judgment and order of the superior court in an opinion set forth in Appendix C, *infra,* and reported as *People v. Krivda,* 91 Cal. Rptr. 219 (1970).

The California Supreme Court granted respondents' petition for hearing and, in a 4-3 decision rendered on July 12, 1971, affirmed the superior court's judgment of dismissal and order suppressing the evidence. *People v. Krivda,* 5 Cal. 3d 357 [96 Cal. Rptr. 62, 486 P.2d 1262] (1971). (*See* Appendix A, *infra.*) The court summarized its holding as follows:

> "[T]he People's appeal from the order of dismissal should be denied, since the evidence which was sought to be suppressed was obtained by means of an unlawful search and seizure and constitutes the only evidence sufficient to sustain a conviction against either defendant." *Id.,* 361 [96 Cal. Rptr. at 64, 486 P.2d at 1264] (*See* Appendix A.)[8]
>
> "[I]n the instant case the contraband was concealed in paper sacks within the barrels, and was not visible without emptying or searching through the barrels' contents. . . . [A]t no time did defendants' trash lose its 'identity' by being mixed and combined with the 'conglomeration' of trash previously placed in the truck. Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant."
>
> *Id.,* 366-67 [96 Cal. Rptr. at 68, 486 P.2d at 1268]. (*See* Appendix A, *infra.*)

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[8]The court also held that the superior court lacked jurisdiction to entertain respondents' *renewed* motion to suppress, once its original order denying the prior motion to suppress had become final as to the superior court. *Ibid.*

On August 16, 1971, the California Supreme Court denied petitioner's petition for rehearing and application for stay of the remittitur. (*See* Appendix B, *infra.*) Petitioner's application for stay of enforcement of judgment was denied by Mr. Justice Douglas on September 7, 1971. *California v. Krivda* (O.T. 1971, No. A-259).

B. Statement of Facts

The evidence is accurately set forth in the opinion of the California Supreme Court, and the following summary of the facts is taken from that opinion.

> "The pertinent facts leading to defendants' arrest are as follows: On July 1, 1968, Officer Gates received a telephone call from an anonymous informant who told him that 'Roger,' 'Judy' and 'Frankie,' residing at 1901 Nolden, Los Angeles, were engaged in sex and narcotic activities and were injecting Judy's two children with methedrine. Thereafter Officers Gates and Marsden located the premises, a single family dwelling, observed two young female children in front, and ran a utility check which showed that Judy Krivda paid the utilities there. Investigation also showed that Edward Krivda, whose wife was named Judy, had previously been arrested for narcotic activity. About 11 a.m. on July 19, 1968, the officers returned to the address and saw several trash barrels in front on the parkway adjacent to the sidewalk; they also observed the refuse collectors approaching and stopped them about half a block west, identified themselves and requested them to empty the well of their trash truck and pick up the trash in the cans in front of 1901 Nolden.

"The officers watched the men empty the well of their truck, drive to the front of the premises and empty the trash barrels; one block north the officers examined the contents of the well and found five paper sacks containing miscellaneous marijuana debris and marijuana seeds. One sack also contained six partially burned marijuana cigarettes, an envelope bearing the words 'Edward Krivda, 1901 Nolden,' a white, lined piece of paper on which was a handwritten letter with the name 'Frankie' mentioned in it dated Saturday, 13th, signed by 'Al,' and a three by five card dated Wednesday, 6-26, bearing the names 'Roger' and 'Judy.' The officers took a position of vantage and watched the premises; they observed defendant Roger Minor come out of the house at that address, pick up the trash barrels and carry them to the front porch of the house. They then approached the premises, effected entry, discovered defendants in the residence and recovered additional marijuana and paraphernalia."

People v. Krivda, 5 Cal. 3d 357, 360 [96 Cal. Rptr. 62, 63-64, 486 P.2d 1262, 1263-64] (1971).

See also Appendix A, *infra*.

C. How the Federal Questions Arose

1. The legality of the seizure of the contraband from the bin of the garbage truck was raised in the pretrial motions to suppress that evidence. [Cl. Tr. pp. 101, 103, 106.] This issue was subsequently passed upon in the state appellate courts, in petitioner's favor by the California Court of Appeal, Second Appellate District, *People v. Krivda*, 91 Cal. Rptr. 219 (1970)

(*see* Appendix C, *infra*), and, subsequently, adversely to petitioner by the California Supreme Court. *People v. Krivda*, 5 Cal. 3d 357 [96 Cal. Rptr. 62, 486 P.2d 1262] (1971). (*See* Appendix A, *infra.*) That court based its holding on the Fourth Amendment to the United States Constitution, as interpreted by this Court's decision in *Katz v. United States*, 389 U.S. 347, 353. *See People v. Krivda, supra* at 365 [96 Cal. Rptr. at 67, 486 P.2d at 1267].

2. The issue whether application of the exclusionary rule is constitutionally compelled under the circumstances of the present case was implicit in the pretrial motion to suppress the evidence in question and was specifically raised in petitioner's petition for rehearing in the California Supreme Court (at p. 2)[4] in light of the dissenting opinion of Chief Justice Burger in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411-27, which came down subsequent to submission of the present case in the California Supreme Court. Petitioner's petition for rehearing was denied by the California Supreme Court without written opinion on August 16, 1971. (*See* Appendix B, *infra.*)

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[4]A copy of that document is on file with this Court in conjunction with the prior application for stay of enforcement of judgment. *California v. Krivda* (O.T. 1971, No. A-259).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

Seizure of Contraband Abandoned in Trash Receptacles Placed on Public Property for Public Pickup Involves a Constitutional Issue of Vital Importance to Law Enforcement on Which the United States Courts of Appeals Have Rendered Conflicting Decisions; Furthermore, the California Supreme Court's Holding, Suppressing Such Evidence, Misconstrues Decisions of This Court

The availability of an important investigative method is in issue as the result of the California Supreme Court's holding that the police officers acted unconstitutionally in seizing contraband found in the bin of a garbage truck after abandonment in a trash receptable deposited on public property for pickup. Unless certiorari is granted, law enforcement officers in California and any other jurisdiction which might follow the views of the California Supreme Court will be foreclosed from engaging in the aforementioned method of investigation, a method considered essential in combatting those criminal activities which, by their very nature, involving clandestine conduct and no victim, are already exceedingly difficult to investigate.

The need for appellate review of restrictive trial court rulings granting pretrial motions to suppress evidence was noted in the report of the President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society 140 (1967).

See also American Bar Association, Standards Relating to Criminal Appeals (1969).[5]

It is particularly appropriate for this Court to consider problems of this sort because only rarely is this Court given an opportunity to determine whether limitations imposed by lower courts *upon law enforcement* have improperly restricted the right of the public as a whole to the proper enforcement of its laws. Most of the cases before this Court, by the very nature of our judicial system, concern situations wherein lower courts have held that constitutional rights of defendants have not been infringed and this Court then determines whether such rights do in fact exist or in fact have been infringed.[6]

Furthermore, the California Supreme Court's decision is inconsistent with holdings of this Court. The California court's conclusion that a person has a rea-

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[5]With reference to the Presidential Commission's Report, the A.B.A. study remarked:

"The Commission reasoned that the law of search and seizure and of confessions is uncertain, that the issue of admissibility of such evidence is of great significance to both prosecution and defense, and that therefore lower court decisions restricting police conduct should be open to testing on appeal. If such restrictive decisions are not appealable, the Commission found, prosecution officials would either have to abandon the practice without an authoritative appellate ruling or have to continue the practice despite the lower court's decision in the hope of a future trial court decision sustaining the practice from which a defense appeal might produce an appellate court ruling." *Id.*, 38.

[6]Only six of the fifty search and seizure cases decided subsequent to *Mapp v. Ohio*, 367 U.S. 643, and indexed in the digest of the Supreme Court Reporter, arose in this Court as a result of a petition by the prosecution for a writ of certiorari or by way of a prosecution appeal. (The prosecution prevailed in five of the six.)

sonable expectation of privacy[7] in the trash which he deposits in a trash receptacle placed for public pickup on public property, is contrary to this Court's holdings that "There can be nothing unlawful in the Government's appropriation of . . . abandoned property." *Abel v. United States,* 362 U.S. 217, 241 (where the issue was whether the contents of a wastepaper basket in a vacated hotel room could properly be searched by the officers.) *See also Hester v. United States,* 265 U.S. 57, 58.

On the specific issue whether one's reasonable expectation of privacy extends to the contents of trash receptacles placed outside the premises for pickup, the intermediate federal courts appear to have arrived at conflicting conclusions.

In *United States v. Dzialak,* 441 F.2d 212, 215 (2d Cir. 1971), the trash deposited in such receptacles was characterized as abandoned and subject to seizure

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[7]The phrase "reasonable expectation of privacy" appeared for the first time in a majority opinion of this Court in *Terry v. Ohio,* 392 U.S. 1, 9, and was subsequently used in *Alderman v. United States,* 394 U.S. 165, 179, n. 11. The same concept has appeared, although in slightly different phraseology, in *Mancusi v. De Forte,* 392 U.S. 364, 368 ("reasonable expectation of freedom from governmental intrusion"), and in *United States v. White,* 401 U.S. 745, 752 ("what expectations of privacy are constitutionally 'justifiable'—what expectations the 4th Amendment will protect in the absence of a warrant"). However, tracing the history of this phrase discloses that the concept originated in the concurring opinion of Justice Harlan in *Katz v. United States,* 389 U.S. 347, wherein he stated as follows with respect to this concept:

> "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.' " *Id.,* 361.

by government agents. The defendant had argued in the Court of Appeals that the search was unlawful, pointing out the existence of a town ordinance making it unlawful for anyone except an authorized employee of the town to rummage in the trash.[8]

The Court of Appeals went on to state:

> "We think it abundantly clear that Dzialak abandoned the property. The town ordinance simply cannot change the fact that he 'threw [these articles] away' and thus there 'can be nothing unlawful in the Government's appropriation of such abandoned property.' [Citation.]" *Ibid.*

However, in *Work v. United States,* 243 F.2d 660, 662-63 (D.C. Cir. 1957), a different circuit held that there was no abandonment of the trash and that its seizure was unlawful. *But compare* the dissenting opinion of then Circuit Judge Burger in the *Work* case:

> "I dissent because I do not find in this record an *unreasonable* search and seizure prohibited by the Constitution. . . .
>
> "The Fourth Amendment was designed to safeguard the individual's right of privacy in his home and in his personal effects against arbitrary intrusion by government officials. I cannot find a fundamental constitutional right to privacy in the garbage or trash pail of a rooming house where the receptacle is located out of doors in sight from the street and where there is an admitted

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[8]The California Supreme Court in *People v. Krivda, supra,* 5 Cal. 3d at 366 (n. 7) [96 Cal. Rptr. at 68, 486 P.2d at 1268], discussed local ordinances governing trash collection, and, in the text preceding the footnote, further discussed similar municipal ordinances and their legal effect.

constant invitation to the public authorities of the District to remove the contents as refuse. . . ." (Emphasis in the original; footnote omitted.)

Work v. United States, supra at 663 (Burger, J., dissenting).[9]

See also United States v. Minker, 312 F.2d 632, 634-35 (3d Cir. 1962), *cert. denied,* 372 U.S. 953.

State court decisions have also rejected the conclusion reached by the California Supreme Court in the case at bar. In *Croker v. State,* 477 P.2d 122 (Wyo. 1970), the Wyoming Supreme Court was faced with the legality of a police inspection of garbage. In that case trash collectors had entered the defendant's back yard through a gate in order to remove and empty his trash cans. Following such action by the trash collectors, the police inspected the defendant's garbage prior to its being commingled with the trash of other persons. The Wyoming Supreme Court stated:

"Even assuming under the rationale of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, and Work v. United States, 100 U.S. App.D.C. 237, 243 F.2d 660, and the hold-

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[9]This view conforms to the second requirement of the reasonable expectation of privacy" test as set forth by Justice Harlan when he first enunciated this test. As noted in footnote 7, Justice Harlan in stating his understanding of what constitutes a reasonable expectation, stated that the reasonableness of the expectation is to be determined by ascertaining whether society is prepared to recognize that expectation as reasonable. *Katz v. United States,* 389 U.S. 347, 361.) This Court appears to have accepted this test in *United States v. White,* 401 U.S. 745, wherein this Court stated that in terms of the principles of *Katz* the problem is to determine "what expectations of privacy are constitutionally 'justifiable'—what expectations the 4th Amendment will protect in the absence of a warrant." (401 U.S. 745, 752.)

ing in People v. Edwards, 71 Cal.2d 1096, 80 Cal.Rptr. 663, 458 P.2d 713, that defendant did have a reasonable expectation of privacy to the contents of his garbage cans as long as the contents were on his premises it would be most unrealistic to hold that such reasonable expectation of privacy would reach beyond the confines of defendant's premises. It is our view that when defendant put his garbage in his garbage cans for purposes of removal he impliedly consented to entry upon his premises by the garbage collectors in the regular performance of their duties and to the removal of the garbage by them to the alley, which was open to the public. At that time the officers or anyone else, if the garbage collectors did not object, were free to examine the contents of the collectors' barrel."

Croker v. State, supra at 125.

See also State v. Purvis, 249 Ore. 404 [438 P.2d 1002, 1005] (1968).

Petitioner submits that the rationale of the above-quoted cases makes it clear that persons who deposit contraband in trash receptacles and then place these receptacles on public property adjacent to the street for pickup by rubbish collectors do not exhibit any expectation of privacy with respect thereto—and certainly no *reasonable* expectation of privacy. The very nature of garbage is such that it is no longer wanted and has been discarded for whatever use may be made of it by either the trash collector, who may pick up the trash, a citizen who may pick through the trash, or the local governing agency which may use it for fill in a public

dump or perhaps, in light of ecological trends, attempt to reclaim some of the material therein.

Although the citizen who throws away his garbage may prefer that his neighbors not inspect it or that the trash man not observe it, the citizen has in fact removed any indicia of privacy from the discarded property upon placing it in a trash receptacle adjacent to a public street., Almost by definition, discarded garbage is abandoned property, outside the ambit of the Fourth Amendment's protection of reasonable expectations of privacy. *Abel v. United States, supra.* The dignity of that protection should not be contaminated by a false equation of discarded garbage, placed adjacent to the street, with the sanctity of the home.

II

Application of the Exclusionary Rule Is Not Constitutionally Compelled Under the Circumstances of the Present Case

The case against the exclusionary rule was forcefully stated and developed at length by Chief Justice Burger in his dissenting opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 411-27. That opinion chronicles the "many expressions of disenchantment with the Exclusionary Rule," *id.,* 426, and calls for consideration of "at least some narrowing of its thrust so as to eliminate the anomalies it has produced." *Id.,* 424.

No purpose would be served by reiterating here the many cited arguments and authorities supportive of a total or partial abolition of the exclusionary rule.

It is petitioner's position that the present case affords an ideal vehicle for this Court to effect a re-

examination of the exclusionary rule and either directly narrow the operation of the rule or set forth in some detail what might be constitutionally acceptable as a legislative alternative to the restrictive exclusion of evidence which this Court imposed as a requirement upon the States in *Mapp v. Ohio,* 367 U.S. 643.

If this Court rejects the grounds urged in Argument I, *infra,* in support of the granting of certiorari, this case will indeed become the classic example of where "The criminal is to go free because the constable has blundered." *People v. De Fore,* 242 N.Y. 13, 21 [150 N.E. 585, 587] (1926).

As previously noted, the California Supreme Court's determination that the police officers' inspection of the garbage truck's bin violated respondents' Fourth Amendment rights led that court to conclude that *the prosecution against respondents must be dismissed.* Immunity from prosecution for possession of marijuana was granted to the two respondents, who (as the opinion notes) were injecting respondent Krivda's children with methedrine, because of the conclusion reached by four members of the California Supreme Court. That conclusion, rejected by three members of that court and the panel of three justices of the intermediate California Court of Appeal, was that the police officers had three years earlier acted unreasonably in their on-the-spot decision that society's interest required inspection of the contents of the garbage truck bin.

It is petitioner's position that the officers acted reasonably under Fourth Amendment standards. But even if the majority of the California Supreme Court, with its hindsight and expertise in the area of constitutional law, is correct in concluding that the officers'

actions were unreasonable, should such an error on the officers' part automatically invoke the exclusionary rule? The present case provides a graphic illustration of conduct that can at most be assessed as a non-wilful technical violation in an area of constitutional law so fraught with uncertainty that even seven California Supreme Court justices were as closely divided as possible on the proper course for the officers to have taken.

Certainly there are unusual situations where a violation of Fourth Amendment rights may be so flagrant and wilful as to call for exclusion of all evidence improperly obtained thereby. But clearly this is not such a case—nor are the majority of cases involving Fourth Amendment violations, where law enforcement officers, prosecutors, and innocent members of society are unjustly punished by the monolithic judicial response of exclusion of evidence, often resulting in the release of the theoretically aggrieved suspect.

Conclusion

The Fourth Amendment, in its protection of reasonable expectations of privacy, is commonly said to be a recognition of the protected status which a civilized society accords to the home, as typified in the maxim that "a man's home is his castle." However, it would be a perversion of this maxim of constitutional law to make of a man's garbage can an inviolable sidewalk sanctuary for the concealment of refuse from his cache of narcotics.

In view of the vital nature of the federal constitutional issues presented in this petition, and the conflict among the federal circuit court decisions and state su-

preme court decisions in this area, petitioner submits that a writ of certiorari should issue to review the decision of the California Supreme Court.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

RONALD M. GEORGE,
Deputy Attorney General of the State of California,

JOSEPH P. BUSCH,
District Attorney of Los Angeles County,

HARRY WOOD,
Head, Appellate Division,

HARRY B. SONDHEIM,
DANIEL L. LIEBERMAN,
Deputy District Attorneys,

Attorneys for Petitioner.

APPENDIX A

Opinion of the Supreme Court of the State of California

In the Supreme Court of the State of California
In Bank

The People, Plaintiff and Appellant,	)	Crim. 15295
v.	)	(Sup. Ct. No.
Judith Krivda and Roger T. Minor, Defendants and Respondents.	)	A-234389)

Filed: July 12, 1971.

The question presented by this appeal is whether a householder who places contraband in trash barrels and subsequently places the barrels adjacent to the street for pickup by the rubbish collector may be deemed to have abandoned the trash at that location and to have forsaken any reasonable expectation of privacy with respect thereto.

The pertinent facts leading to defendants' arrest are as follows: On July 1, 1968, Officer Gates received a telephone call from an anonymous informant who told him that "Roger," "Judy" and "Frankie," residing at 1901 Nolden, Los Angeles, were engaged in sex and narcotic activities and were injecting Judy's two children with methedrine. Thereafter Officers Gates and Marsden located the premises, a single family dwelling, observed two young female children in front, and ran a utility check which showed that Judy Krivda paid the utilities there. Investigation also showed that Edward Krivda, whose wife was named Judy, had previously been arrested for narcotic activity. About 11 a.m. on July 19, 1968, the officers returned to the address and saw several trash barrels in front on the park-

way adjacent to the sidewalk; they also observed the refuse collectors approaching and stopped them about half a block west, identified themselves and requested them to empty the well of their trash truck and pick up the trash in the cans in front of 1901 Nolden.

The officers watched the men empty the well of their truck, drive to the front of the premises and empty the trash barrels; one block north the officers examined the contents of the well and found five paper sacks containing miscellaneous marijuana debris and marijuana seeds. One sack also contained four to six partially burned marijuana cigarettes, an envelope bearing the words "Edward Krivda, 1901 Nolden," a white, lined piece of paper on which was a handwritten letter with the name "Frankie" mentioned in it dated Saturday, 13th, signed by "Al," and a three by five card dated Wednesday, 6-26, bearing the names "Roger" and "Judy." The officers took a position of vantage and watched the premises; they observed defendant Roger Minor come out of the house at that address, pick up the trash barrels and carry them to the front porch of the house. They then approached the premises, effected entry, discovered defendants in the residence and recovered additional marijuana and paraphernalia.

On September 18, 1968, defendants were charged by information with possession of marijuana (Health & Saf. Code, § 11530). Thereafter, trial was continued because of the pendency on appeal of People v. Edwards, 71 Cal.2d 1096, decided by this court on September 24, 1969. On October 24, 1969, the superior court heard and denied defendants' motion to suppress evidence (Pen. Code, § 1538.5). On December 12, when the case was called for trial setting, defendants

moved to "reopen" the ruling on their motion to suppress. The court granted the motion to reopen, took the matter under submission on the basis of the transcript and evidence previously admitted at the prior hearing, and granted the motion to suppress. Then, on its own motion, the court ordered the action dismissed (Pen. Code, § 1385). The People appeal from the order of dismissal (Pen. Code, § 1238, subd. 7).

We have concluded that the court had no jurisdiction to entertain defendants' renewed motion to suppress, once its order denying the prior motion had become final as to that court, since the sole and exclusive remedy prior to conviction to review the denial of a motion to suppress is by means of an extraordinary writ of mandate or prohibition pursuant to Penal Code section 1538.5, subdivision (i). However, we have also concluded that the People's appeal from the order of dismissal should be denied, since the evidence which was sought to be suppressed was obtained by means of an unlawful search and seizure and constitutes the only evidence sufficient to sustain a conviction against either defendant.

The People first contend that the trial court had no jurisdiction to entertain defendants' renewed motion to suppress. That contention finds support in the language of section 1538.5, subdivision (i),[1] which per-

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[1]Section 1538.5, subdivision (i), provides as follows: "If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after

(This footnote is continued on next page)

mits the defendant to make a motion to suppress (or to renew a prior motion denied at the preliminary hearing) at a special de novo hearing in superior court prior to trial, and which further provides that "After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing."

As we pointed out in People v. Superior Court (Edmonds), 4 Cal.3d 605, 610, one of the purposes underlying the enactment of section 1538.5 was to reduce the unnecessary waste of judicial time and effort involved in rehearing and redetermining at various stages in a criminal proceeding the same search and seizure questions. Accordingly, in that case we reaffirmed the principle set forth in People v. O'Brien, 71 Cal.2d 394, 403, that the superior court has no jurisdiction to entertain *at trial* a renewed motion to suppress previously denied at a special hearing in that court. By similar reasoning, we conclude that the superior court is without jurisdiction to entertain such a renewed motion prior to trial, following the expiration of the 30-day period within which to seek extraordinary relief. As stated in People v. Superior Court (Green), 10 Cal.App.3d 477, 480-481, "Had the Legislature intended to allow before trial the trial court's review, by way of rehearing, of a ruling on a pretrial motion made in

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notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing."

the trial court it would have so provided. Construction of section 1538.5 to permit such a rehearing would doubtless result in repeated and endless hearings on each of which the same search and seizure issue would be raised before successive judges until one granted the motion. This may or may not amount to forum shopping but such practice would fail to comport with justice, encourage trial delays impairing the right of both parties to a speedy trial and do violence to the original purpose of section 1538.5, Penal Code—to streamline our criminal court processes, cut down the number of times a defendant can raise the search and seizure issue prior to conviction and provide an orderly system for litigating the validity of a search and seizure. Under the statute a defendant is entitled to make only one pretrial motion to suppress evidence in the superior court and if it is denied his only remedy is, within thirty days, to seek a writ of mandate or prohibition from this court; if he is unsuccessful and the evidence sought to be suppressed is used against him resulting in conviction he may further pursue his remedy by appeal from the judgment upon which further review of the validity of the search or seizure may be had. [Citation.] He is not entitled to a second hearing on the motion prior to trial."

Defendants point out that in the instant case, their renewed motion was presented in the form of a motion to "reopen" to the same judge who had previously denied it. Defendants urge us to hold that under such circumstances the judge had jurisdiction to reconsider and correct his own prior ruling on defendants' motion to suppress. It is true that there are several cases which hold that a court has the inherent power to reconsider, and thereupon to modify, revoke or set aside, a prior

order upon determining that its order was erroneous. (See People v. Eggers, 30 Cal.2d 676, 692; Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 634; Harth v. Ten Eyck, 16 Cal.2d 829, 832-834; San Francisco Lathing, Inc. v. Superior Court, 271 Cal. App.2d 78, 81; Big Bear Mun. Water Dist. v. Superior Court, 269 Cal.App.2d 919, 928; 2 Witkin, Cal. Procedure, Proceedings Without Trial, § 12, p. 1649.) It has been suggested, however, that the foregoing rule is limited in its application to mere "procedural" rulings which may be modified at any time before final judgment (see Greene v. Superior Court, 55 Cal.2d 403, 405; City of San Diego v. Superior Court, 36 Cal.2d 483, 486), and is an exception to the general rule that judicial error which occurs in the rendition of orders or judgments which are the fault of judicial discretion, as opposed to clerical error or inadvertence, may not be corrected except by statutory procedure (see In re Candelario, 3 Cal.3d 702, 705; Minardi v. Collopy, 49 Cal.2d 348, 352-353; Key System Transit Lines v. Superior Court, 36 Cal.2d 184, 191-196 [dis. op. of Traynor, J.]).

Without attempting to reconcile these various cases,[2] or to determine whether motions to suppress may be characterized as "procedural" only,[3] it seems apparent from the language of subdivision (i) of sec-

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[2]A recent article examines some of the cases in this area and finds them largely unreconcilable. See Goodman, The Power of the Trial Judge to Change a Prior Ruling on a Motion, 45 State Bar J. (1970) 483.

[3]A proceeding under section 1538.5 to suppress evidence is one in which a full hearing is held on the issues before the superior court sitting as finder of fact. (People v. West, 3 Cal.3d 595, 602.) Accordingly, an order made following the hearing is arguably more in the nature of a judgment after trial than an ordinary ruling on a procedural matter during the course of trial.

tion 1538.5 that the Legislature, in order to reduce the time spent in relitigating search and seizure questions, intended that the court's order denying a motion to suppress should, in the absence of a timely request for extraordinary appellate relief, become final 30 days thereafter and not subject to further review until an appeal is taken following trial. Otherwise considerable judicial time could be expended in rehearing and redetermining matters which had already been fully litigated, thereby possibly delaying the trial of the case.

However, until the 30-day period has expired and the order has become final, the court should have the inherent power, prior to trial, to reconsider and "reopen" its prior ruling.[4] The 30-day limitation on reconsideration should minimize the likelihood of substantial delay of trial, and should enable the judge to review his ruling while the facts underlying the motion and the law applicable thereto are still fresh in mind. Of course, successive applications based upon the same factual showing should be discouraged, and ordinarily the court should refuse to consider a renewed motion supported by substantially the same facts as the one denied, but until its order has become final the court should have jurisdiction to reconsider it. (See Imperial Beverage Co. v. Superior Court, *supra*, 24 Cal.2d 627, 634; Big Bear Mun. Water Dist. v. Superior Court, *supra*, 269 Cal.App.2d 919, 928; Josephson v. Superior Court, 219 Cal.App.2d 354, 359.)

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[4]See People v. Leighter, 15 Cal.App.3d 389, 393-395, upholding the trial court's jurisdiction to reconsider its ruling on a prior motion to suppress made within the 30-day period and prior to commencement of trial.

In the instant case, defendants failed to request reconsideration of the court's order denying their motion to suppress until after the 30-day period under subdivision (i) had expired. Accordingly, the trial court should not have entertained their renewed motion, and its order granting the same was beyond its jurisdiction and void. Nevertheless, both parties have briefed and argued the merits of defendants' motion, and we are prepared to rule upon it at this time rather than to reverse and remand the case for trial, for we have concluded that defendants' original motion to suppress should have been granted. Since the People have conceded that there is no additional evidence against defendants, it is apparent that the People's appeal from the order of dismissal must be denied.[5]

The People contend that the search of defendants' trash barrels and the seizure of their contents were reasonable. They point out that the barrels were located near the sidewalk on public property, that neither the officers nor trash collectors committed a trespass in seizing and examining the contents of the barrels, and that under the facts in this case defendants may be deemed to have abandoned their trash and to have forsaken any reasonable expectation of privacy with respect thereto.

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[5]In People v. Superior Court (Edmonds), *supra*, 4 Cal.3d 605, 611, involving similar procedural issues, we decided not to reach the merits of the defendant's motion to suppress. In that case, the void order granting the renewed motion occurred after trial, but no dismissal was entered. Therefore, our refusal to consider the merits would not require the parties to undergo an unnecessary trial, as in this case. Further, unlike this case, we had no jurisdiction to reach the merits, since the matter reached us on petition for mandate, rather than on appeal. As we pointed out in *Edmonds*, mandate is proper only to review *jurisdiction*, not ordinary judicial error. (See also People v. Superior Court (Howard), 69 Cal.2d 491, 499-501.)

A number of cases in upholding searches in open fields or grounds around a house have stated their conclusions in terms of whether the place was a "constitutionally protected area," (see, e.g., cases cited in People v. Edwards, *supra,* 71 Cal.2d 1096). That phrase, however, does not afford a solution to every case involving a claim of an illegal search and seizure (see Katz v. United States, 389 U.S. 347, 350-352), and we have held that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion (People v. Bradley, 1 Cal.3d 80, 84; People v. Edwards, *supra,* 71 Cal.2d 1096, 1104-1105).

The People note that *Edwards* and *Bradley* were decided subsequent to the events which led to defendants' arrest herein and urge that the principles announced in those decisions should be given only prospective effect. However, the "reasonable expectation of privacy" test adopted in *Edwards* and reaffirmed in *Bradley* represented no new constitutional principle which might call into play the various criteria (see, e.g., *Edwards, supra,* at pp. 1107-1108) used for resolving retroactivity problems. Instead, that test was put forth at least as early as Katz v. United States, *supra,* 389 U.S. 347, 353, wherein the Court held that "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment," and that in the absence of prior judicial authorization the search and seizure were unreasonable. (See also People v. Edwards, *supra,* 71 Cal.2d 1096, 1103-1104;

People v. Terry, 70 Cal.2d 410, 427.) We conclude that the principles of *Edwards* and *Bradley*, to the extent they depend upon like principles in Katz v. United States, *supra*, may properly be applied to test the validity of the search and seizure at issue herein.

As the People point out, the facts in the instant case differ from those in *Edwards* in certain respects. In *Edwards*, the officers searched trash cans which were placed in the "open back yard area" behind defendants' residence, a few feet away from the back door. Consequently, the officers were required to trespass upon defendants' property in order to make the search. Although the foregoing facts were relevant to our determination that defendants had a reasonable expectation of privacy, they were not necessarily dispositive of that determination. The fact that a search may or may not involve a trespass or other invasion of defendant's property interests is not conclusive, for "The prohibition in the [Fourth] amendment is against unreasonable searches and seizures, not trespasses." (People v. Terry, *supra*, 70 Cal.2d 410, 427.) As stated in Katz v. United States, *supra*, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citation.] But what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected [Citations]" (Italics added; 347 U.S. at pp. 351-352.)

The question remains whether defendants herein had a reasonable expectation of privacy[4] with respect to the contents of their trash barrels. The People urge that the placement of the barrels near the sidewalk for collection constituted an abandonment of their con-

tents. Indeed, had defendants simply cast their trash onto the sidewalk for anyone to pick over and cart away, we would have no difficulty finding that defendants had thereby foresaken any reasonable expectation of privacy with respect thereto.[6]

The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public. To the contrary, many municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated. (See, e.g., Los Angeles County Ord. No. 5860, ch. IX, §§ 1611-1622, 1681-1691.) Moreover, these ordinances commonly prohibit unauthorized persons from tampering with trash containers. (*Id.*, § 1710.) The provisions of these ordinances would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalk for collection.[7]

Aside from municipal ordinances, there may exist an additional element of expected privacy whenever one

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[6]Note that if defendants had in fact abandoned the contraband found in their trash barrels, the People might be unable to establish the dominion and control necessary to constitute the offense of possession with respect thereto. However, in the instant case, that contraband led to the discovery of additional marijuana and paraphernalia in defendants' apartment which could properly form the basis for a conviction.

[7]Note also that ordinances governing trash collections may require the householder to place his trash barrels at the curb along the street in front of his house, at least in the absence of other arrangements with the collectors. (*Id.*, § 1706.) Thus, defendants' placement of the barrels near the sidewalk was not necessarily indicative of any intent other than to comply with such a requirement. We would be reluctant to distinguish *Edwards* solely on the basis that the defendant in that case was permitted to place his trash barrels in his backyard for collection.

consigns his property to the trash can, to be dumped, destroyed and forgotten. As stated in *Edwards,* "The marijuana itself was not visible without 'rummaging' in the receptacle. So far as appears defendants alone resided at the house. In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case. We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, *at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere.* Half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." (Italics added; People v. Edwards, *supra,* 71 Cal.2d 1096, 1104.)

Similarly, in the instant case the contraband was concealed in paper sacks within the barrels, and was not visible without emptying or searching through the barrels' contents. The fact that the officers did not examine the contents until the trash had been placed into the well of the refuse truck does not distinguish *Edwards,* for at no time did defendants' trash lose its "identity" by being mixed and combined with the "conglomeration" of trash previously placed in the truck. Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant.

Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen

that trash collectors or even vagrants or children may rummage through one's trash barrels and remove some of its contents. However, as stated in People v. McGrew, 1 Cal.3d 404, 412, "The hotel guest may reasonably expect a maid to enter his room to clean up, but absent unusual circumstances he should not be held to expect that a hotel clerk will lead the police on a search of his room."

It is also clear, as in *Edwards,* that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. (See People v. Edwards, *supra,* 71 Cal.2d 1096, 1104-1105.) We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant.

Since the marijuana found in defendants' trash barrels was the result of an illegal search and seizure, that evidence should have been ordered suppressed pursuant to Penal Code section 1538.5. The People apparently concede that the additional contraband and paraphernalia discovered in defendants' residence was "tainted fruit of the poisonous tree" and likewise should have been ordered excluded as the product of the prior illegal search. (See People v. Edwards, *supra,* 71 Cal. 2d 1096, 1105, and cases cited.) The People also concede that they have no further evidence against defendants. Accordingly, the action was properly dismissed under Penal Code section 1385.

The judgment of dismissal is affirmed.

Burke, *J.*

We Concur:

Peters, *J.*
Tobriner, *J.*
Mosk, *J.*

People v. Krivda, Crim. 15295.

CONCURRING AND DISSENTING OPINION BY WRIGHT, C.J.

I join in the opinion of the majority that a motion to suppress illegally seized evidence, made pursuant to Penal Code section 1538.5, may not be renewed prior to trial, following expiration of the 30-day period with which to seek extraordinary relief. I do not agree, however, that the area protected by the Fourth Amendment proscription of unreasonable searches and seizures encompasses parkways immediately adjacent to public thoroughfares or pedestrian walkways or that the police action enlisting the assistance of the authorized trash collectors in separately picking up trash placed at the curb for pickup transmuted the collection into an unreasonable seizure. Moreover, in my view, a householder has neither a reasonable expectation of privacy as to his curbside trash, nor a right to expect that his trash will be commingled with that of others before it is subject to examination, governmental or otherwise. Whatever his hope may be as to the ultimate disposition of his trash, it does not, in my view, rise to a "reasonable expectation of privacy."[1]

I do not question the proposition enunciated in People v. Edwards, supra, 71 Cal.2d 1096, that trash cans immediately adjacent to a home, in a place to which the general public is not invited, are within a "constitutionally protected area" (Hoffa v. United States (1966) 385 U.S. 293, 301) as to which the

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[1]The existence of an ordinance prohibiting tampering with trash containers by unauthorized persons in no way affects this conclusion. Ordinances such as this are typically enacted to protect the exclusive right of a city or its authorized agent to collect the trash. (See 7 McQuillan, Municipal Corporations, p. 96, § 24.251, and cases cited therein.)

owner may reasonably expect privacy from governmental intrusion. That expectation, however, is inextricably bound up in the physical location of the trash cans. I cannot accept the proposition that either *Edwards* or the Constitution compels extension of protection to trash cans to those placed adjacent to or on a public thoroughfare, nor do I find any constitutional compulsion for the newly developed doctrine of "commingled trash."

The majority purport to find support for their conclusion that the police invaded defendants' reasonable expectation of privacy as to their trash container in Katz v. United States, supra, 389 U.S. 347, where the court held that electronic eavesdropping on a telephonic conversation violated the defendant's privacy on which he justifiably relied. Since *Katz*, however, the court has further refined the constitutionally justifiable expectations which are protected by the Fourth Amendment. In United States v. White (1971) .... U.S. .... [39 U.S.L.Week 4387], the court emphasized the continued viability of Hoffa v. United States, supra, 385 U.S. 293, and prior cases approving various means by which governmental agents or informers, using electronic equipment, record or transmit their conversations with wrongdoers who believe the conversation will remain private. If *White* and *Katz* have any applicability in areas other than electronic eavesdropping, it is in their holdings that an actual expectation of privacy based on a belief that a confederate or one believed to be a confederate will not reveal a defendant's secrets, is not a constitutionally justified expectation of privacy protected by the Fourth Amendment. In *White* the court explained: "Inescapably, one contemplating illegal activities must realize and risk that

his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubts he has, the risk is his." (39 U.S.L.Week at 4389.) Surely the defendant who discards his trash and places it at the curb to be picked up must also assume the risk that the collector of the rubbish may be an agent of the police or may permit the police to examine the unconglomerated trash once it is picked up. A "constitutionally justifiable expectation of privacy" need not extend to the well of a trash truck.

We need not adopt the position of the Second Circuit that trash placed at curbside for pickup may be characterized as "abandoned" (U.S. v. Dzialak (1971) .... F.2d .... [9 Crim. L. 2046]) since, whether intended to be abandoned solely to the authorized collector or not, it is neither in a constitutionally protected area nor the subject of a constitutionally justifiable expectation of privacy.

I would reverse the judgment.

Wright, *C. J.*

We concur:

McComb, *J.*

Sullivan, *J.*

APPENDIX B

Order Denying Rehearing

In the Supreme Court of the State of California, in Bank.

People v. Krivda et al. Crim. No. 15295.

Order Due September 10, 1971.

Filed August 1, 1971.

Appellant's petition for rehearing and application for stay of remittitur denied.

Wright, C. J., McComb, J., and Sullivan, J., are of the opinion that the petition should be granted.

Wright
Chief Justice

APPENDIX C

Opinion of the Court of Appeal

In the Court of Appeal of the State of California
Second Appellate District
Division One

The People of the State of California, Plaintiff and Appellant,	)	Criminal No. 18140
vs.	)	S.C. #
Judith Krivda and Roger T. Minor, Defendants and Respondents.	)	A-234389

APPEAL from an order of the Superior Court of Los Angeles County. Robert Firth, Judge. Reversed.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, Evelle J. Younger, District Attorney, Harry Wood and Daniel L. Lieberman, Deputy District Attorneys, for Appellant.

Sam Bubrick for Respondents.

On September 8, 1968, defendants were charged with violation of section 11530, Health and Safety Code. Thereafter trial of the cause was continued because of the pendency on appeal of *People v. Edwards*, 71 Cal.2d 1096, decided September 24, 1969. On October 24, 1969, defendants' motion under section 1538.5, Penal Code, was argued and denied. On December 12, 1969, the cause was called for trial setting at which time defendants moved "to reopen" their motion under section 1538.5 Penal Code. The trial judge granted both motions and dismissed the case under section 1238, subdivision 8, Penal Code. The People appeal from the order.

On July 1, 1968, Officer Gates received a telephone call from an anonymous informant who told him that

"Roger" and "Judy" and a Lesbian named "Frankie," residing at 1901 Nolden, Los Angeles, were engaged in sex and narcotic activities and were injecting Judy's two children with methedrine. Thereafter Officers Gates and Marsden located the premises, observed two young female children in front and ran a utility check which showed that Judy Krivda paid the utilities there; investigation also showed that Edward Krivda, whose wife was named Judy, had previously been arrested for narcotic activity. Around 11 a.m. on July 9, 1968, the officers returned to the address and saw several trash barrels in front on the parkway adjacent to the sidewalk; they also observed the refuse collectors approaching and stopped them about half a block west, identified themselves and requested them to empty the well of their trash truck and pick up the trash in the cans in front of 1901 Nolden. The residence there is a single family dwelling and the trash barrels were directly in front of 1901 Nolden in the parkway in front of the house adjacent to the sidewalk. The officers watched the men empty the well of their truck, drive to the front of the premises and empty the trash barrels; one block north they examined the contents of the well and found five paper sacks containing miscellaneous marijuana debris and marijuana seeds in one of which were also four to six partially burned marijuana cigarettes and an envelope bearing the name Edward Krivda, 1901 Nolden, a white lined piece of paper on which was a handwritten letter with the name "Frankie" mentioned in it dated Saturday, 13th, signed by Al, and a three by five card dated Wednesday, 6-26, bearing the names of Roger and Judy. The officers took a position of vantage and watched the premises; they observed Roger Minor come out of the

address, pick up the trash barrels and carry them to the front porch of the house; they then approached the premises, effected entry, discovered defendants in the residence and recovered contraband and paraphernalia.

There is merit to appellant's first point that the superior court should not have reheard the 1538.5 motion after denying the same in October 1969. Once a trial court has entertained a motion under section 1538.5, Penal Code, before trial and denied the same, defendants' only remedy is to seek a writ of mandate or prohibition from the appellate court (§ 1538.5(i), Pen. Code) and, if unsuccessful therein, after conviction, a review on appeal from the judgment. (*Thompson v. Superior Court,* 262 Cal.App.2d 98, 106-107.) Prior to trial the court does not have jurisdiction to hear a second motion under section 1538.5, Penal Code, or rehear the first and thereby permit relitigation of the issue of search and seizure. (§ 1538.5, Pen. Code; *People v. O'Brien,* 71 Cal.2d 394, 402-403; *People v. Superior Court,* 10 Cal.App.3d 477, 480.) However, inasmuch as the matter is now before us and in the interest of economy of court time, we proceed to the merits.

At the outset it should be noted that the events herein took place in July 1968, and *People v. Edwards,* 71 Cal.2d 1096, upon which the trial court placed reliance, was decided September 24, 1969. In the light of the discussion in *People v. Edwards,* 71 Cal.2d 1096, relative to criteria guiding resolution of the question of retroactivity (pp. 1107-1109) and the holding therein that the rule of *Chimel v. California,* 395 U.S. 752 [23 L.Ed.2d 685, 89 S.Ct. 2034] be given prospective application, we conclude that the criteria mentioned in support thereof also strongly support pro-

spectivity for *People v. Edwards,* 71 Cal.2d 1096. In any event, for other reasons hereinafter discussed we conclude that *People v. Edwards,* 71 Cal.2d 1096, does not support the order herein.

Relying on the following in *People v. Bradley,* 1 Cal.3d 80, at page 84, the People argue that the doctrine of *People v. Edwards,* 71 Cal.2d 1096, regarding a defendant's reasonable expectancy of privacy is not the only test applicable to claims of unreasonable search and seizure: "A number of cases in upholding searches in open fields or grounds around a house have stated their conclusions in terms of whether the place was a 'constitutionally protected area,' (See, e.g., cases cited in *People v. Edwards,* 71 Cal.2d 1096 [80 Cal.Rptr. 633, 458 P.2d 713]). That phrase, however, does not afford a solution to every case involving a claim of an illegal search and seizure (see *Katz v. United States,* 389 U.S. 347, 350-352 [19 L.Ed.2d 576, 581-582, 88 S.Ct. 507]), and we believe that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion (*People v. Edwards,* 71 Cal.2d 1096 [80 Cal.Rptr. 633, 458 P.2d 713], and cases cited therein)." (*People v. Bradley,* 1 Cal.3d 80, 84.)

There really is no issue before us concerning whether the special protection accorded by the Fourth Amendment to the people in their "persons, homes, papers, and effects" is extended to the location of the trash barrels for the record shows that while the barrels were sitting in a public place—a parkway adjacent to the sidewalk—and they were observed without committing trespass, the officers at no time touched, inspected or searched the barrels; the examination of the contents

of these barrels took place a block away from the premises and then only after the trash collectors had emptied them into the well of their truck. It is true that the trash collectors were under orders of the police to empty the well of their truck and were their agents in doing so but it cannot be denied that they picked up the barrels from the front of defendants' residence and emptied their contents into the truck and drove away all in the ordinary course of their duties as trash collectors and this they would have done had not the officers intervened. In *People v. Edwards,* 71 Cal.2d 1096, 1104, the trash can was searched, was within a few feet of the back door to defendants' home and required trespass for its inspection.

As to abandonment, when property has been abandoned by defendant a search of the same does not constitute an unreasonable search, and appropriation thereof an unreasonable seizure. (*Abel v. United States,* 362 U.S. 217, 241 [4 L.Ed.2d 668, 80 S.Ct. 683; *Hester v. United States,* 265 U.S. 57, 58 [68 L.Ed. 898, 44 S.Ct. 445]; *People v. Long,* 6 Cal.App.3d 741, 748-749.) In *People v. Edwards,* 71 Cal.2d 1096, placing marijuana in a trash can "so situated and used"—two or three feet from the back door of defendants' home and an adjunct to the domestic economy (p. 1104)—did not constitute an abandonment except as to trashmen. While abandonment appears to have been a consideration of the court in *Edwards* in determining whether defendants exhibited a reasonable expectation of privacy, the foundational facts differ somewhat from those here involved. In *Edwards* the trash can, near defendants' back door, was used by them as a secret place of safe keeping "enough [marijuana] to roll a couple of cigarettes or more" (p.

1099). It was obvious that defendants in relegating the contraband to the trash can had no intention of abandoning it as trash but of hiding it for future use. Here the marijuana debris—leaves, seeds and partially smoked cigarettes—not of useable quantity, in the paper sacks found among defendants' trash, obviously was not contraband defendants were stashing away for future use but throwing away. That the debris was not placed in the trash can for safe keeping but for discard is a reasonable inference from the fact that the trash barrels were moved by defendants from their premises to a public place for regular pickup by trash collectors. Thus, leaving the barrels and their contents in a public place for removal by trash collectors to their truck, and discarding, among other trash, the marijuana debris in a paper sack that among other things contained papers bearing personal reference to defendants and their address fail to convince us that defendants exhibited an expectation of privacy and if they did that such expectation was reasonable under the circumstances of the case. Certainly they knew that when the collectors came the trash would be dumped into the truck; also reasonably they should have known that even when the trash was commingled if someone saw the contents of the one paper sack, the ownership of that particular piece of trash could be identified by the papers found therein. Under the circumstances of this case we do not think that the well of a trash truck on a public street a block away from defendants' residence constitutes a protected area or that the marijuana debris found therein was not abandoned by defendants; nor does it appear to us that when the trash found its way into the well of the truck any expectation of privacy in regard thereto by defendants is reasonable.

We are confronted with the following in *People v. Edwards,* 71 Cal.2d 1096, appearing after the court's holding: "We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." (P. 1104.) Here by the time defendants' trash came to rest in the well of the truck it was outside the realm of curious examination by prying eyes of neighbors or others for it was then in the exclusive possession of the trash collectors. Is the householder also entitled to protection from a routine examination by police after the trash becomes the property of the refuse collector? The honest resident neither wants it nor needs it. While it might well be said that the trash collectors in this case were acting as agents of the police in clearing the well of the truck and dumping defendants' trash into the *empty* well so that it could be more easily identified, they surely were not acting as police agents in picking up defendants' trash in the first instance. As far as defendants knew and ever contemplated, and it is a fact, under ordinary circumstances and in the ordinary course of events without intervention of the police, the trash, as it was, would have been collected and dumped into the well, the only difference, it would have been emptied on top of other trash; as long as the marijuana debris and the identification papers remained together in the sack, even though commingled with other trash, they would not lose their identity and meaning. In any

event, the trash when and where examined by the officers was beyond the "rumor and gossip" stage from which *Edwards* sought to protect the householder.

For any one of the foregoing reasons, the order is reversed.

Lillie, *Acting P. J.*

We concur:

Thompson, *J.*

Gustafson, *J.*